

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JERRY LARA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73579

FILED

AUG 14 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jerry Lara appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on April 12, 2017.¹ Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Lara filed his petition nearly 17 years after issuance of the remittitur on direct appeal on May 23, 2000. *See Lara v. State*, Docket No. 31651 (Order Dismissing Appeal, April 26, 2000). Lara's petition was therefore untimely filed. *See* NRS 34.726(1). Lara's petition was also successive as he had previously filed postconviction petitions for a writ of habeas corpus.² *See* NRS 34.810(2). Lara's petition was therefore procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Further, because the State specifically pleaded laches, Lara was required to overcome the presumption of prejudice to the State. *See* NRS 34.800(2).

¹This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

²*See Lara v. State*, Docket No. 55702 (Order of Affirmance, September 15, 2011); *Lara v. State*, 120 Nev. 177, 87 P.3d 528 (2004).

Lara's underlying, substantive claim was that he was entitled to the retroactive application of *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000). He argued the holdings in *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016), and *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016), provided good cause to overcome the procedural bars because they changed the framework under which retroactivity is analyzed. However, Lara's conviction was not yet final when *Byford* was decided, see *Colwell v. State*, 118 Nev. 807, 820, 59 P.3d 463, 472 (2002); see also U.S. Sup. Ct. R. 13, such that retroactivity is not at issue in Lara's case. Further, Lara could not demonstrate actual prejudice. The Nevada Supreme Court applied *Byford* to Lara's case and concluded he could not demonstrate prejudice because substantial evidence supported his guilt of first-degree murder. *Lara v. State*, Docket No. 55702 (Order of Affirmance, September 15, 2011). This holding is the law of the case. See *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

Lara also claimed he could demonstrate a fundamental miscarriage of justice to overcome the procedural bars because "there is a significant risk that [he] stands convicted of an act that the law does not make criminal." A petitioner may overcome procedural bars by demonstrating he is actually innocent such that the failure to consider his petition would result in a fundamental miscarriage of justice. *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Lara claimed below that "[t]he facts in this case established that [he] only committed a second-degree murder." This is not factual innocence. Accordingly, Lara failed to demonstrate he is actually innocent such that

failing to consider his claims on the merits would result in a fundamental miscarriage of justice. And for this same reason, he failed to overcome the presumption of prejudice to the State. See NRS 34.800.

For the foregoing reasons, we conclude the district court did not err by denying Lara's petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.³


_____, C.J.
Silver


_____, J.
Gibbons

cc: Hon. Elissa F. Cadish, District Judge
Jerry Lara
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

³We conclude the district court did not abuse its discretion by declining to appoint postconviction counsel. See NRS 34.750(1); *Renteria-Novoa v. State*, 133 Nev. ___, ___, 391 P.3d 760, 760-61 (2017).

The Honorable Jerome T. Tao did not participate in the decision in this matter.